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In the Supreme Court of the United States

OCTOBER TERM, 1969

OCALA STAR-BANNER COMPANY,
a corporation, and LOYAL PHILLIPS,

Petitioners,

vs.

LEONARD DAMRON,

Respondent.

PETITIONERS' SUPPLEMENTAL BRIEF ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, STATE OF FLORIDA

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INDEX

	Page
Statement	1
Federal Question Properly Raised Below	2
Lower Court Incorrectly Construed Federal Constitutional Law of Libel	5
Conclusion	9

CITATIONS

Beckley v. Hanks (1967) 389 U.S. 81	4, 5
Garrison v. Louisiana (1964) 379 U.S. 364	8
Merritt-Chapman & Scott vs. Associated Press (Fla.C.C.1970) 33 Fla.Supp. 102	6
Stern & Gressman on Supreme Court Practice	4
Williams v. Georgia (1955) 349 U.S. 375,383	4

No. 1373

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STATEMENT

Petitioners filed their Petition for Certiorari on March 30, 1970, to review a decision and judgment of the District Court of Appeal, First District, State of Florida, reported at 221

So.2d. 459. That decision erroneously construed the Federal Constitutional Law of Libel and held the First Amendment protection was limited to the "*official* conduct" of a "public official".

Respondent has filed Brief in Opposition, first raising certain questions as to jurisdiction. Petitioners feel constrained to file this brief reply as permitted by Supreme Court Rules 24.4 and 24.5.

FEDERAL QUESTION PROPERLY RAISED BELOW

Respondent's Brief in Opposition appears to argue that the Federal Constitutional Question was not timely raised below.

The answer is:

(a) Petitioners filed motion for new trial challenging the sufficiency of the evidence to support the jury verdict and to meet the Constitutional standards (R. 20, 21). The trial court denied motion for new trial, *expressly considered and passed on the Federal Constitutional question,* and held:

> "1. That the verdict for the Plaintiff in the amount of $22,000 is not excessive, and *is supported by the evidence.*"[1]
>
> "2. That the decisions of the United States Supreme Court on libel actions as decided in the case of New York Times vs. Sullivan, and *subsequent* decisions *cited in defendant's motion for new trial,*[2] relating to public officials or public figures in the official conduct of

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NOTE 1: In Florida, as elsewhere, the question of the weight and sufficiency of the evidence must be raised by motion for new trial. 2 Fla.Jur., Appeals, Sec. 73, and cases cited.

NOTE 2: Italics here and elsewhere added by us.

their office or position *are not applicable to this cause of action* which was founded upon a newspaper publication of the defendants which *was libelous per se* and made no reference to the public offices[3] held or sought by the plaintiff."

"3. That there is no error in the proceedings." (R. 22).

(b) The trial court had theretofore denied motions to dismiss the complaint for failure to allege "malice", and to strike the claim for "*public figure damages*" and damages "as a *public officer* or as a *candidate* for public office."[4] (R. 7, 8, 9)

(c) The District Court of Appeal opinion, here sought to be reviewed, dealt solely and entirely with the Federal Constitutional question, and squarely and unequivocably held the so-called Federal Constitutional Law of Libel was not applicable here (221 So.2d 459 – Appendix A to Petition for Certiorari). Nothing else was even discussed by the Appeal Court.

(d) By per curiam order (231 So.2d. 822) the Supreme Court of Florida refused to review the decision of the District Court of Appeal. It was first necessary to seek review by the Florida Supreme Court to get the case here.

(e) At no point in the proceedings did any court even intimate the Constitutional question had not been raised - in

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NOTE 3: But the editor testified the only reason he made the mistake *and used the name "Leonard"* Damron was because he thought it was the public figure (who had been so much in the public eye and in the news) who was involved. (TT. 163, 164, 171)

NOTE 4: The Federal doctrine was the basis for these motions.

fact, it was the primary issue which was considered and upon which each the trial and appeal court ruled, as shown by the record. As stated in Respondent's own cited case of *Williams v. Georgia* (1955) 349 U.S. 375, 383:

> "But where a State allows (Federal Constitutional) questions of this sort to be raised at a late stage and be determined by its courts as a matter of discretion, we are not concluded from assuming jurisdiction and deciding whether the state court action in the particular circumstances is, in effect, an avoidance of the federal right."

See also Stern and Gressman on Supreme Court Practice, Second Edition, page 91, Fourth Edition, page 127, citing cases and holding that when the state court assumes or holds that a federal question is properly before it and then proceeds to consider and dispose of that issue (as was done here both in the trial court and at 221 So.2d 459) the United States Supreme Court's concern with the proper raising of the federal question in the state court disappears. Just as in *Beckley*, infra, the fact that the State Supreme Court refused to review, cannot prevent this Court from reviewing an erroneous constitutional holding.

(f) Finally, Respondent cites on page 6 of his brief *Beckley Newspaper Corp. v. Hanks* (1967) 389 U.S. 81, and we quote from page 82:

> "However, since it is clear that the jury verdict was rendered upon instructions which misstate the law and since petitioner has properly challenged the sufficiency of the evidence, *we have undertaken an independent examination* of the record as a whole *'so as to assure ourselves that the judgment does not constitute a forbidden intrusion* on the field of free expression."

Respondent's attempts to go outside the record as to alleged oral concessions by trial counsel Ayres at pre-trial (not shown by the record and denied by Ayres) do not overcome the fact that the court directed a verdict on liability over Petitioners' objections, the point was timely raised, and the Federal Constitutional Law of Libel was the chief issue considered and disposed of in both the trial court's order (R. 20) and the Appeal Court opinion sought to be reviewed (Appendix A). Cf. *Beckley*, supra, as to improper instructions actually submitted by counsel for defendant newspaper itself.

Nor is there any indication by either the trial court or the appeal court that the Florida courts felt Petitioners had waived anything or that the Federal Constitutional question was not properly before the Florida courts. They based their whole decision on their construction of the Federal doctrine under the First Amendment. It is that construction and that decision, spread upon the public records and printed in Southern Reporter 2nd, that so disturb Petitioners.

The opinion at 221 So.2d 459 *speaks for itself* as to whether it passed on the constitutional question. The Florida procedure rules printed as Appendices to Respondent's brief were not even mentioned in the briefs and arguments in, or the orders of, the Florida Supreme Court.

LOWER COURT INCORRECTLY CONSTRUED FEDERAL CONSTITUTIONAL LAW OF LIBEL

Respondent devotes only two full pages of his brief to the real issue in the case - his flat and completely wrong contention, on page 8, that "the libel of public official on a matter *unrelated to his official conduct* does not come within the rule laid down in *New York Times v. Sullivan.*"

Despite Respondent's present argument, we quote the concession Respondent made on page 17 of his written brief before the Supreme Court of Florida:

> "This decision (Time v. Hill (1967) 385 U.S. 374) clearly shows that the United States Supreme Court is granting a privilege under the First Amendment to the United States Constitution when the article is directed to official conduct, official duties, public issues, *matters of public interest,* and public affairs."

It is a matter of public interest. The fact that the plaintiff is a public official or public figure helps determine the extent of public interest. And when Respondent alleged and proved the public applied the story to him *as* Mayor and *as* a candidate for public office, and he sought and recovered damages for *loss of the elections occasioned thereby,* he is *estopped* to deny the public interest in the story. An indictment for perjury in a civil rights case - particularly in a Florida rural county in 1966 - was a matter of real public interest.

On March 5, 1970, the Florida Circuit Court for Dade County, Crawford, J. (*not* in the First District Court of Appeal district) in granting the news media summary judgment in a libel suit for falsely accusing plaintiff of being "bankrupt", held:

> "Clearly, the *New York Times* doctrine applies to a situation such as that here, for not only was the plaintiff the alter ego of its principal officer and controlling stockholder, Louis Wolfson, who was very definitely a public figure, but *the matter was one of wide public interest.* See All Diet Foods v. Time (N.Y. 1968) 290 N.Y.S.2d. 445, applying the doctrine to a *food store;* Bon Air v. Time (S.D.Ga.1969) 295 Fed.Supp. 704, ap-

plying the doctrine to an *old hotel;* Altoona v. Dun & Bradstreet (W.D.Pa.1968) 286 Fed.Supp. 899, applying the doctrine to a *corporation* suing for damage to its credit; Fotochrome v. New York Herald Tribune (N.Y. Sup.Ct.1969) 61 Misc.2d.226, a case on almost all fours with that here, where the doctrine was applied to a news story about the financial standing of the plaintiff *corporation* and where the paper got its erroneous data from reliable sources; United Medical v. C.B.S. (C.A.-4, 1968) 404 Fed.2d. 706, where the doctrine was applied to a medical *laboratory,* certiorari denied at 394 U.S. 921; Time v. McLaney (C.A.Fla.1969) 406 Fed.2d. 565, certiorari denied at 395 U.S. 922, on a holding that the doctrine applied to a matter of *public interest;* and Rosenbloom v. Metromedia (C.A.-3, 1969) 414 Fed.2d. 892, where again the doctrine was applied to a matter of *public interest.* In all cases, judgments were entered for the defendant news media."

> Merritt-Chapman & Scott Corporation vs. Associated Press, Florida Publishing Company, et al. (Fla.C.C.,1970) 33 Fla. Supp. 102 (Advance Opinion Sheet).

This holding, in our judgment, not only correctly states the law but is in accord with Respondent's statement in his Florida Supreme Court brief, page 17, above quoted.

Respondent admitted in his brief before the Florida Supreme Court that the Federal doctrine applies to "matters of public interest". But now he rests his entire case on his flat assertion that when a *"public official"* is involved, the doctrine is limited to *"official conduct"*. How can that be?

A matter may be of public interest. But if plaintiff happens to be President Nixon, or Senator Jones, or Governor

Kirk, or Mayor Damron, or candidate for County Tax Assessor Damron, that *increases* the public interest - not *eliminates* the applicability of the Federal rule.

Respondent on page 6 of his brief makes the further erroneous statement that this Court "has *not* commingled the rules laid down by this Court on public officials with the rules on public figures."

This is the same false reasoning applied by the District Court of Appeal. Both Respondent and the court below have completely overlooked the fact that later cases have expanded the original holding. Just as the doctrine is not confined to "official" conduct of a public figure, nor does it require "official conduct" to make it a matter of "public interest", the doctrine is not so confined in the case of a public official.

As stated in *Garrison* v. *Louisiana* (1964) 379 U.S. 364, the doctrine extends to "private reputation as well as public reputation" and "anything which might touch on an official's fitness for office is relevant."

When Plaintiff-Respondent sues, says he is a public official and candidate for public office, that the public applied the story to him in that capacity, that he lost the elections because thereof, and he asks for specific damage to him as a public figure, he cannot then say the Federal rule does not apply. He has made his own bed (by his pleadings and proof) and he must lie in it.

Respondent himself injected the Federal doctrine into the case. He cannot have his cake and eat it too.

CONCLUSION

Respondent was much in the public eye. He was a constant actor on the public stage.

He sought to continue as Mayor. He left his business with his brother James, and was almost a full-time candidate for another public office, County Tax Assessor.

Respondent sought and received much publicity. He kept a scrap book (TT. 9). It was because of all this publicity that the area editor knew of Respondent, and automatically used his name instead of his brother James.

In Respondent's libel suit he claimed damages for loss of the elections, and for loss of public standing.

This is the very situation the Federal rule was intended to cover.

In the famous words of our former President:

"If you can't stand the heat, stay out of the kitchen!"

We respectfully submit the Court should grant the writ and reverse summarily the judgment below, as it did in *Beckley*, supra.

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April, 1970.